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## Court Appeal Will Test Groundwater Nexus For Water Act Authority

A California municipal discharger is preparing to appeal a novel federal district court ruling allowing Clean Water Act (CWA) regulation of discharges to isolated waterbodies that have groundwater connections to navigable waters.

Industry sources say that if the [district court's ruling](#) is upheld on appeal, it could significantly expand federal CWA jurisdiction over isolated waterbodies after the Supreme Court's landmark *SWANCC* ruling generally narrowed water act authority over such waterbodies.

“A decision to regulate isolated waters connected to navigable waters by groundwater would certainly broaden the current scope of Clean Water Act protections,” one industry attorney says.

However, federal appeals courts have generally not allowed regulation of discharges into isolated waters that are connected by groundwater because the courts have not viewed groundwater as having a sufficient nexus to navigable waters. Instead, appellate decisions require a surface water connection to assert regulatory authority, even if there is only a tenuous connection.

However, in its Jan. 23 decision in *Northern California River Watch v. City of Healdsburg*, the U.S. District Court for the Northern District of California ruled that the municipal discharger is required to obtain a water act permit for discharge of effluent into a pond connected by a groundwater aquifer to the Russian River.

The court rejected arguments by the city that the Supreme Court's ruling in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* requires a surface hydrological connection between isolated and navigable waterbodies in order to assert regulatory authority. “Rather than impose a hydrological-connection requirement, *SWANCC* reaffirmed that wetlands (and other waterbodies like ponds) *adjacent to navigable waters* share a significant nexus worthy of protection under the Clean Water Act,” the court ruled.

The judge has ordered the city to “take immediate steps” to obtain a National Pollutant Discharge Elimination System permit for the pond, and barred discharges without a permit effective April

22, although he suggested he may give the city additional time to obtain a permit. In addition, the judge is holding a hearing Feb. 26 to determine any penalties the city may face.

At issue is what constitutes a “significant nexus” between isolated waterbodies and navigable waters in order to justify CWA protection. In a 1985 decision, the Supreme Court ruled in *United States v. Riverside Bayview Homes, Inc.* that all wetlands adjacent to navigable waters that are not “navigable-in-fact” still meet the “significant nexus” test because they are “inseparably bound up in” navigable waters. “It was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*,” the high court later wrote in the *SWANCC* ruling.

However, the high court’s 2001 *SWANCC* decision narrowed the scope of isolated waters protected by the water law by ruling that the presence of migratory birds is insufficient to establish this “significant nexus.” “In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water,” the court wrote in its *SWANCC* ruling. “But we conclude that the text of the statute will not allow this.”

Since the *SWANCC* and *Riverside Bayview* decisions, federal appeals courts throughout the country have debated what kind of hydrological connection constitutes a “significant nexus” to navigable waters, with courts making decisions based on the broad *Riverside Bayview* interpretation and the narrower *SWANCC* interpretation that bars a “significant nexus” finding based on the presence of migratory birds.

Since *SWANCC*, most appeals courts have supported broad CWA protection, ruling that even waterbodies located several miles from a navigable water that eventually connect to that water are subject to federal regulation. For example, the U.S. Court of Appeals for the 4th Circuit ruled in *United States v. Deaton* that wetlands next to a roadside ditch meet the “significant nexus” test, even though the wetlands connect only through a series of streams and other channels stretching eight miles.

However, several appeals courts have ruled that groundwater does not provide a “significant nexus.” For example, the 5th Circuit, adopting a broad view of the *SWANCC* decision, ruled in *Rice v. Harken Exploration Co.* that an intermittent stream did not have a sufficient connection to navigable waters because the discharge reached the navigable water via groundwater.

These differences in appellate interpretations of *SWANCC* are prompting industry attorneys to petition the high court to review a number of the cases to make a final determination on what constitutes a “significant nexus” between isolated waterbodies and navigable waters.

However, the Justice Department (DOJ) is arguing that the appellate circuits are not split on the issue because *Rice* does not raise the same “significant nexus” issues as the other cases. DOJ lawyers argued in a brief opposing high court review in one case that the *Rice* decision declines regulation based on a ground water, instead of surface water, connection to navigable waters.

A municipal attorney says the city of Healdsburg will argue on appeal that a groundwater connection between a discharge pond and navigable waters is not sufficient to justify regulation. The source says *SWANCC* imposes a surface hydrological connection requirement.

The city also plans to argue that the discharge pond is part of its wastewater treatment facility and therefore exempted from CWA requirements, according to the attorney. In addition, the city will argue that the discharge pond is part of an ongoing gravel excavation project, which also is exempted from water act jurisdiction.

However, environmentalists welcomed the ruling. “This decision will further define jurisdiction of adjacent waterbodies including wetlands implied within the Clean Water Act’s original intent, helping to protect critical riparian habitat and eliminating harmful pollutants from entering our precious waterways via groundwater,” Northern California River Watch said in a Jan. 26 statement. -- *Natalie Baughman*

